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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-333

DARREN BOERCKEL,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIFTH DISTRICT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions Involved:	
Amendment IV	2
Amendment XIV	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	12
Appendix A	A-1

Table of Authorities

Brown v. Illinois, 422 U.S. 590, 95 Sup. Ct. 2254, 45 L. Ed.2d 416 ..... 8, 9, 11

Davis v. Mississippi, 394 U.S. 721, 89 Sup. Ct. 1394, 22 L.Ed.2d 676 8

Dunaway v. New York, — U.S. — 99 Sup. Ct. 2248, 60 L. Ed.2d 824 (1979) 8, 9, 10, 11, 12

Morales v. New York, 396 U.S. 102, 90 Sup. Ct. 291, 24 L. Ed.2d 299 (1970) 9

People v. Dunaway, 61 A.D. 2d 299, 402 N.Y.S.2d 490, 491 (1977) 10

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Petitioner prays that a writ of certiorari issue to review the decision of the Illinois Appellate Court, Fifth District, entered in the above-entitled cause on January 10, 1979. A Petition for leave to appeal to the Illinois Supreme Court was denied on May 31, 1979.

OPINION BELOW

The opinion of the Illinois Appellate Court, Fifth District, is reported at 68 Ill. App.3d 103, 385 N.E.2d 815, 24 Ill. Dec. 674 (1979). Petitioner was tried before a jury in the Circuit Court of Montgomery County, IL in March of 1977 and there is no opinion of that court.

JURISDICTION

The final order of the Illinois Appellate Court was entered on January 10, 1979. The Illinois Supreme Court denies leave to appeal on May 31, 1979. Jurisdiction of this Court is conferred pursuant to 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

The question presented to this Court for review is whether the Petitioner was illegally arrested, thereby rendering his subsequent confession inadmissible as the fruit of the poisonous tree.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . ."

Amendment XIV

Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

On October 31, 1976 the Petitioner was taken into custody and charged with the offenses of rape, burglary and aggravated battery. (C 12) On September 14, 1976 the Montgomery County grand jury returned an indictment formally charging him with the three above-named offenses.

Prior to the trial of the instant case, the defendant, through his attorney, filed a written Motion to Suppress Confession and Statements alleging inter alia, that certain statements taken from the defendant were done so without defendant knowingly waiving his constitutional rights, that the statements were given involuntarily where the defendant was under duress, and that the defendant was arrested without probable cause at the time he allegedly gave the statements, thereby rendering them inadmissible as the product of the illegal arrest. (C 66)

On November 30, 1976, (prior to trial) a hearing was held on the Motion and said Motion was denied. (Motion to Suppress 84)

At trial, the defendant reasserted his Motion to Suppress the confession and statements on the same grounds and the motion was again denied. (R 277-280)

At the suppression hearing and at trial, Officer David Lienard of the Mt. Olive, Illinois Police Department, testified that he

was the officer who first apprehended the defendant and brought him to the Mt. Olive Police Station at approximately 2:50 p.m. on August 31, 1976. (Motion to Suppress 35, 49). Lienard indicated that State Police Detective Larry Huggins had told him some two hours earlier that the defendant was a suspect and that he had been unsuccessful in locating him in Litchfield, Illinois, and that he knew the defendant and had seen him on prior occasions in Mt. Olive. (Motion to Suppress 42, R 211-212). An arrest report filed by Lienard on August 31, 1976, indicated that if he located Boerckel "he would hold him and contact Detective Huggins." (C 220) He testified that he first came in contact with the defendant one block away from the police station (Motion to Suppress 52) and took the defendant to the police station indicating that Detective Huggins wanted to talk to him. (Motion to Suppress 40). According to Lienard, the Defendant was not under arrest, but free to leave if he wanted. (Motion to Suppress 39)

Shortly after arriving at the police station Lienard testified that the defendant requested that he be allowed to notify his girlfriend that he was at the police station. (Motion to Suppress 43, 54).

Lienard said that he accompanied the defendant to a street corner about one block from the police station where he (the defendant) spoke with his girlfriend for about five minutes. During the conversation Lienard stood a few feet away from him, and then he (Lienard) accompanied him back to the police station. (Motion to Suppress, 55-57)

Lienard testified further that Officer Huggins arrived at approximately 3:40 p.m., advised the defendant of his Miranda rights, and thereafter had a conversation with the defendant wherein the defendant confessed to raping Mary Draper. (Motion to Suppress 46-48).

At trial, Lienard also testified that Huggins wrote out the confession and that the defendant did not read the confession back to them, but was allowed to read it silently. (R 222) In addition, Lienard indicated that Huggins told the defendant that fingerprints found at the scene of the alleged rape were his. (R. 223)

Lienard also said that he and Huggins told the defendant they would take him to meet his girlfriend in Staunton, Illinois after they had finished questioning him. (R. 224, 226)

Detective Larry Huggins, an Illinois State Policeman, also testified at the suppression hearing and later at the trial. Huggins related that he came in contact with the defendant at 3:45 p.m. on August 31, 1976, at the Mt. Olive Police Station after receiving a call from Officer Lienard at approximately 3:00 p.m. that the defendant had been apprehended. (Motion to Suppress 9). According to Huggins, he read defendant the *Miranda* rights but he was not under arrest. (Motion to Suppress 10, 11).

Huggins indicated that the Litchfield Police Department felt the defendant was a strong suspect although they had no physical evidence indicating that he had committed the crime. (Motion to Suppress 23-24, R. 260-1). In addition, while questioning him, it was indicated to the defendant that he may be a suspect. (R. 257)

Huggins then advised him that he was investigating the rape of a Mary Draper in Litchfield and wanted to know if the defendant had any information about the crime. Defendant related to the detective that he thought he had seen two subjects on the victim's porch on the night of the occurrence but could not identify them. The defendant several times denied having ever been in the victim's home. (Motion to Suppress 12-13). Despite the denials, Huggins continued to ask him if he had been in the house. (R. 246)

Huggins asked him if he had been in trouble with the law and defendant indicated he had. The detective then told the defendant that fingerprints had been found on a window fan that had been pushed in to gain entry to the victim's home and that these fingerprints were those of the defendant. (R. 246-47), (Motion to Suppress 13). Huggins told the defendant this although he had not looked at any prints found at the scene nor did he have any evidence to indicate the defendant's prints were found at the scene. (Motion to Suppress 31, 32, R. 255). On cross-examination, he admitted this to be a total misrepresentation. (Motion to Suppress 32).

On cross-examination at the trial, Huggins also indicated that during the questioning of the defendant, it was promised that he would be taken by the police officers to see his girlfriend in Staunton, at the conclusion of the interview.

At this time, Huggins said the defendant admitted breaking into the victim's home and a short time later further admitted to raping her. (Motion to Suppress 13-14). Thereafter, Huggins prepared a written statement which the defendant signed. (Motion to Suppress 14-15, R. 250-252).

Huggins did not inquire as to defendant's educational level or reading skills at the time the written statement was prepared. (Motion to Suppress 28-31).

The defendant testified in his own behalf at the hearing on the Motion to Suppress. He indicated that Officer Lienard had picked him up, searched him and brought him to the Mt. Olive Police Station. At no time did he feel he was free to leave the station while awaiting the arrival of Detective Huggins. He also testified that Officer Lienard accompanied him to contact his girlfriend at this time. (Motion to Suppress 63-64, 73).

It was also brought out on direct examination that the defendant did not have the ability to read the statement that he

had signed, (Motion to Suppress 65-66) and that he did not understand that the statement could be used against him in a court of law. (Motion to Suppress 78).

The defendant's mother, Caroline Boerckel, also testified at the suppression hearing. She indicated that her son's reading ability was very limited (Motion to Suppress 81) and that he was a slow learner having attended special education classes since the second grade. (Motion to Suppress 83).

The court denied Petitioner's motion to suppress without elaboration. The motion was renewed at the trial level and again denied. Petitioner further incorporated said issue in his post trial motion as required by Illinois law and said post trial motion was denied.

Petitioner appealed his conviction to the Illinois Appellate Court, Fifth District, and raised the instant issue. The Court affirmed his conviction, holding that the defendant was not under arrest before he made his confession.

The Petitioner's timely petition for leave to appeal before the Illinois Supreme Court was denied on May 31, 1979.

REASONS FOR GRANTING THE WRIT

The statement of the issue is defendant was under arrest without probable cause at the time he gave a confession, thereby rendering said confession inadmissible as the fruit of the poisonous tree.

Petitioner brings this writ to challenge the decision of the Illinois Appellate Court, Fifth District, that Petitioner's confession was admissible at his trial. Petitioner contends that the Illinois Appellate Court's holding is in direct conflict with this court's decision in *Dunaway v. New York*, — U.S. — 99 Sup. Ct. 2248, 60 L. Ed. 2d 824 (1979).

In *Dunaway* this Court held that custodial questioning or an investigatory detention is not allowed on less than probable cause for a full fledged arrest. 99 Sup. Ct. at 2258. Any such custodial questioning or investigatory detention is in violation of the Fourth Amendment of the United States Constitution as an unreasonable seizure of the person.

In *Dunaway* this Court was guided by two previous decisions, *Davis v. Mississippi*, 394 U.S. 721, 89 Sup. Ct. 1394, 22 L.Ed. 2d 676; *Brown v. Illinois*, 422 U.S. 590, 95 Sup. Ct. 2254, 45 L. Ed.2d 416.

In *Davis*, the Court rejected the State's argument that the detention was of a type which does not require probable cause. It was stated:

> "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment investigatory procedures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusion upon

> the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detention'." 394 U.S. at 726 and 727.

Brown v. Illinois, supra, also disapproved arrests made for "investigatory" purposes on less than probable cause. Armed with the above two cases this court in *Dunaway* specifically decided for the first time the question it had reserved in *Morales v. New York*, 396 U.S. 102, 90 Sup. Ct. 291, 24 L. Ed.2d 299 (1970); whether a custodial interrogation must be based upon probable cause.

In *Dunaway* this Court held that the "application of the Fourth Amendment's requirements of probable cause did not depend on whether an intrusion of this magnitude is termed an arrest under state law." 99 Sup. Ct. at 2256. The Court looked at the circumstances of the confrontation in deciding whether the Petitioner had been seized within the meaning of the Fourth Amendment and decided that Petitioner had been so seized.

The Petitioner submits that in the instant case he was either in custody or detained by the officers and therefore his Fourth Amendment rights were violated since the officers admittedly had no probable cause to arrest him. The issue squarely presented then is whether the Petitioner was arrested or detained within the meaning of the Fourth Amendment at the time he confessed to the crime.

The Illinois Appellate Court held that the defendant voluntarily came to the police station and was never under arrest. Clearly it erred in this regard.

Defendant was a strong suspect in a rape case. Officer David Lienard of the Mt. Olive, IL Police Department was instructed to keep look-out for Petitioner by the Illinois State Police. In Lienard's arrest report he indicated he was to *hold* Petitioner. Petitioner was seen by Officer Lienard and was taken to the

Mt. Olive Police Station, where he was searched by Officer Lienard. Petitioner went in to see his girl friend who was waiting for him on a street corner, Lienard went with him. After returning to the police station Petitioner was taken into an interrogation room. After being given Miranda warnings he was subjected to intense questioning by Lienard and Detective Huggins of the Illinois State Police. The questioning by Lienard and Huggins completely focused on any possible involvement of the Petitioner in the crime. Despite repeated denial, Huggins continued by ask Petitioner if he had been in the victim's home on the night of the occurrence. The Petitioner continued to deny that he had. Finally Huggins told the Petitioner that his fingerprints had been found at the scene of the crime, even though Huggins knew this to be a total misrepresentation, having not seen the prints and not having any knowledge that the fingerprints were those of the Petitioner.

It is submitted that the facts in the instant case are remarkably similar in all respects to the facts in *Dunaway v. New York.*

In *Dunaway* the Petitioner, according to the officer's testimony was asked to come to the police station. The record reflected that the Petitioner went voluntarily. Petitioner was taken to headquarters where he was placed in an interrogation room and given Miranda warnings. He then waived his right to counsel and consented to talk to detectives. Thereafter he made an incriminating statement. The following day the Petitioner asked to see one of the officers and made a second more complete statement. *People v. Dunaway*, 61 A.D.2d 299, 402 N.Y.S.2d 490, 491 (1977). Petitioner testified at a suppression hearing that he was not threatened or abused by the officers and that the statements he made to them were voluntary. 402 N.Y.S.2d 492. In conclusion the *Dunaway* court held that "detention for custodial interrogation—regardless of its label—intrudes so severely on interest protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against legal arrest." 60 L. Ed.2d 838.

An examination of the conduct of the officers in this case clearly portrays activities far more reprehensible than those condemned by this Court in *Dunaway*. Officer Lienard was clearly told to "hold" Petitioner until Detective Huggins of the Illinois State Police could get to his station to interrogate Petitioner. Petitioner was of a young age, with limited intelligence, and therefore easily susceptible to coercion. Detective Huggins intensively interrogated the Petitioner as to his involvement in the subject offense. After repeated denials he took it upon himself to blatantly misrepresent that the Petitioner's fingerprints had been found on a fan that had been knocked through a window in the home of the alleged victim. Clearly the Petitioner was under arrest within the meaning of the Fourth Amendment, as articulated in the *Dunaway* case, if not prior thereto.

The state court's construction of this issue is merely exaltation of form over substance. The crucial issue here is not what the Petitioner may or may not have understood at the time he was subjected to intense questioning by the police officers. The crux of the matter is that the Petitioner was detained for the sole purpose of eliciting statements from him about a crime, at a time when the officers admittedly had no probable cause to hold him. Their actions clearly evidenced that Petitioner was not free to leave. As this court pointed out in its decision in *Brown v. Illinois*, 422 U.S. 590, 95 Sup. Ct. 2254, 45 L.Ed. 2d 416 (1975) the officer's conduct in this case represented a "expedition for evidence" undertaken "in the hope that something might turn up." 422 U.S. 605.

Since there was no intervening act of significance between the time of the arrest and the time the Petitioner made his incriminating statements, as in *Brown v. Illinois, supra* and *Dunaway v. New York, supra,* the statement must be suppressed as the fruit of the prior illegal conduct. Accordingly, this court

should grant the Petitioner's Petition for Writ of Certiorari to review this case.

CONCLUSION

Since the case of *Dunaway v. New York* represents a new development in the definition of when a suspect is under arrest within the meaning of the Fourth Amendment a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 77-518

In the
Appellate Court of Illinois
Fifth District

The People of the State of Illinois, Plaintiff-Appellee, v. Darren Boerckel, Defendant-Appellant.	Appeal from the Circuit Court of Montgomery County, Illinois. Honorable Paul M. Hickman, Judge Presiding

MR. JUSTICE JONES delivered the opinion of the court:

Following a jury trial in the circuit court of Montgomery County, defendant, Darren Boerckel, was found guilty of the offenses of rape, burglary and aggravated battery. The court thereafter imposed respective terms of imprisonment of 20 to 60, five to 15, and two to six years, to be served concurrently. Defendant appeals.

Of the issues raised on appeal, we shall address the following: whether the trial court erred in admitting defendant's confession; whether the trial court erred in denying the discovery of certain material; whether the evidence was sufficient to support defendant's convictions; whether the sentence was excessive; and whether the court erred in denying a motion to determine defendant's fitness for sentencing.

The instant offenses stem from an incident which took place sometime between 10:30 and 11 p.m. on August 23, 1976, in Litchfield, Illinois. At that time, a young man dislodged a

window fan and entered the residence of an 87-year-old woman. Once inside, the man threw the woman onto the floor, and raped her.

The principal evidence against defendant at trial was his written confession, which was admitted over objection, and the testimony of the two law enforcement officers to whom defendant's confession was made.

The written confession consists of three pages. The first page is an Illinois State Police form which purports to be defendant's waiver of certain constitutional rights, commonly referred to as *Miranda* rights. (*Miranda v. Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694). The final two pages set forth a detailed statement of the circumstances of the offense indicating that the defendant was the rapist. Each page is signed by defendant Boerckel and witnessed by Mt. Olive police officer David Lienard and Illinois State Police detective Larry Huggins.

In the remainder of its case, the State endeavored both to show that the crimes had been committed and to corroborate the defendant's confession.

Medical testimony established that the victim had had forceful sexual intercourse on the evening in question, that she had suffered a slight fracture of a rib and a compression fracture of her left tibia, a leg bone, and that she was not able to bear any weight on her left leg for a period of time after the incident.

The victim's son-in-law, James McCart, testified over objection that he received a telephone call from his mother-in-law between 10:30 and 11 p.m. on August 23, 1976. She was crying and stated to him, "Jim, can you come and get me? Some man broke in my window and raped me." Mr. McCart immediately called the Litchfield police department. He and his wife, Alice, then got dressed and drove to the victim's residence.

Both of the McCarts estimated that they arrived at her house within 15 minutes after receiving the telephone call.

Jim and Alice McCart each gave an account of what happened upon their arrival, the main portion of which was a recounting of the statements made by the victim. Testimony as to these statements was allowed on the basis of the excited utterance exception to the hearsay rule.

Mrs. McCart's account was more complete. She indicated that her mother was nervous, upset and crying when they arrived. Mrs. McCart asked her mother if she was hurt, at which time she related what happened. She told them that a man had first come to her bedroom window and awakened her and that he pushed in a dining room window fan and came in the window. After gaining entry, he grabbed her and threw her on the couch and from there onto the floor where he raped her. During the assault he choked her, and when he had finished he exited by the same window.

Although the victim could not see her attacker, she knew he had long hair because she put up her hands and felt it. She also believed he was a young man. Mrs. McCart further indicated that her mother was wearing a nightgown and no undergarments at the time of the attack.

The details of the defendant's confession were substantially the same as those given by the victim to the McCarts. The record further established that defendant had shoulder-length or longer hair at all relevant times and that he told detective Huggins while being interrogated that the woman he raped was not wearing any underpants.

The expert testimony of IBI criminalist James Bald was also offered by the State. Mr. Bald testified that 43 percent of all caucasians have type O blood and that type O blood is characterized by the presence of a high level of H substance in the

red blood cells. He further testified that 80 percent of the general population are what is known as secretors; that is, their saliva and other bodily solutions will exhibit the substance which are in their red blood cells. Mr. Bald ran tests on a blood sample and a saliva sample from defendant. He was able to determine that defendant has type O blood and is a secretor. Mr. Bald also ran several tests on certain stains found on the victim's nightgown. The initial tests revealed that the stains were human seminal material. He then tested for the presence of the various factors. This test revealed the presence of the H substance only. He was therefore able to conclude that the seminal material came from a male with type O blood who was a secretor. Mr. Bald estimated that approximately 39 percent of all caucasians are type O secretors.

The defendant presented an alibi defense through the testimony of his grandmother, Cora Buzick. She testified he was home with her at the time of the rape.

Prior to trial, defendant filed a motion to suppress his confession. After an evidentiary hearing, the court denied the motion. In this appeal the defendant asserts the same three grounds for suppression which he raised in that motion, namely, that the confession is a product or "fruit" of an illegal arrest, that he did not knowingly and voluntarily waive his *Miranda* rights and that his confession is the result of coercion and therefore involuntary.

In the suppression hearing, the testimony of officer David Lienard and detective Larry Huggins was offered by the State to establish the admissibility of defendant's oral and written confessions. These officers testified concerning the circumstances attending the giving of the confessions both in the suppression hearing and at trial. The following facts may be gathered from their testimony.

Since the Litchfield police had indicated to detective Huggins that defendant was considered a strong suspect in the rape case, the detective was anxious to talk to him with reference to his investigation. Consequently, on August 31, 1976 detective Huggins told officer Lienard to keep a look out for defendant and if he saw him to inquire if he would talk to Huggins. Officer Lienard was not directed to arrest defendant.

At approximately 2:50 p.m. officer Lienard, while patrolling in Mt. Olive, saw defendant standing on a street corner. The officer pulled his squad car to the curb and told defendant that detective Huggins wanted to talk to him. The defendant apparently agreed. At any rate, he did not indicate that he did not want to go to the station. According to Lienard, defendant was not under arrest and was free to leave if he wanted to. Officer Lienard then drove defendant to the Mt. Olive police station, which was a block away. Once at the station, Lienard called the State Police headquarters in Litchfield and told the dispatcher to contact Huggins and tell him that defendant was at the Mt. Olive police station. After officer Lienard had placed the call, the defendant asked if he could return to the corner where he had been originally located in order to tell his girlfriend to go on to work. Thereafter, defendant and Lienard walked to the corner, and Lienard observed defendant tell his girlfriend that he was waiting to talk to detective Huggins. They then returned and remained in the main office until detective Huggins arrived at around 3:45 p.m.

Detective Huggins identified himself, informed defendant that he was conducting an investigation into the rape which had occurred in Litchfield and asked defendant if he would be willing to talk to him about the case. The defendant said he would be glad to.

Prior to asking any questions of defendant, Huggins read defendant his *Miranda* rights from a card. Huggins paused after

each right and asked defendant if he understood it before going on to the next one. The defendant indicated that he understood them all. The detective further informed defendant that he was not under arrest, that he was free to go when he wanted to and that he could stop talking to him or demand a lawyer at any time.

The defendant initially told Huggins that while walking to a neighborhood gas station on the night in question to purchase a coke, he saw two men on the victim's porch. One of the men was wearing a stocking cap. When he returned from the station they were gone. Defendant then indicated that there was nothing else he could tell Huggins. At this point, Huggins advised defendant that fingerprints had been found on a window fan at the burgarized premises and that he felt they could be defendant's. The defendant then admitted breaking into the house but denied the commission of the rape. Huggins told defendant that medical evidence had established that the victim was raped and that it was not logical that defendant had burglarized the house as described by the victim but had not committed the rape. After several moments of silence, defendant broke down and said, "I did it." He then described the manner in which the offense took place.

Prior to reducing defendant's confession to writing, Huggins readvised defendant of his *Miranda* rights by reading them to him from the form which comprises page one of the written confession introduced at trial. After reading each right, Huggins paraphrased it into simpler language. The defendant indicated he understood his rights and placed his initials on corresponding lines. Defendant then signed a waiver of rights provision.

Since defendant indicated he did not write very well, detective Huggins wrote out the statement using same or similar words

to those of the defendant. When the two page confession was completed, Huggins read back each page separately, and the defendant acknowledged both pages as being his statement and placed his signature at the bottom of each one.

According to Huggins, there was no physical evidence linking defendant to the crime before the interrogation. After defendant made his statement, he was no longer free to leave, but he was not formally arrested until sometime later when he was delivered to the Litchfield police station.

The testimony of defendant and his mother, Caroline Boerckel, was offered in support of defendant's motion to suppress. The gist of Mrs. Boerckel's testimony was that defendant's reading skills were very limited.

The defendant testified that he felt that he could not have chosen to leave when confronted by officer Lienard. Defendant exhibited his reading ability by reading the *Miranda* warnings aloud, omitting the words he did not know. Defendant's recitation was incomprehensible consisting of pronouns, prepositions and simple verbs. Defendant further testified that he signed the three pages of his confession because he was upset about a "lot of things."

On cross-examination, defendant first maintained that he did not make a statement and that he did not see anything written on the paper. He later conceded that he knew when he signed the statement that it said he had raped the victim. He further agreed that no one forced him to sign the statement and that he did so of his own free will.

The linchpin of defendant's argument that his confession is a fruit of an allegal arrest is that he was arrested before he made his confession.

An arrest involves the following three elements: authority to arrest; assertion of that authority with intent to effect an arrest; and restraint of the person to be arrested. (*People v. Robbins*, 54 Ill. App. 3d 298, 369 N.E.2d 577; *People v. Ussery*, 24 Ill. App. 3d 864, 321 N.E.2d 718.) With respect to the element of intent to effect an arrest, the intent of the officer and the understanding of the arrestee are both essential. (*People v. Wipfler*, 68 Ill. 2d 158, 368 N.E.2d 870; *People v. Ussery*.) However, the understanding of the arrestee is not synonymous with his subjective belief at the time but rather with what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes. *People v. Wipfler*.

By denying defendant's motion to suppress, the trial court made an implicit finding that defendant was not under arrest prior to incriminating himself. Such finding was entirely correct. The record does not establish either an act done with the intent to effect an arrest or restraint of the defendant.

Both officers testified that defendant was not under arrest and that he was free to leave at any time prior to confessing. In addition, detective Huggins specifically told defendant before questioning him that he was not under arrest and that he was free to leave whenever he wanted to. The record before us is devoid of any procedures, acts or utterances of an officer which one normally associates with placing someone under arrest. The evidence, viewed as a whole, does not support a finding that either officer intended to arrest defendant at any time before he confessed or that defendant could have harbored a reasonable and objective belief to the contrary. This is true despite the fact that detective Huggins told defendant he believed the fingerprints found at the scene could be defendant's at a time when he had no basis for such belief. Detective Huggins candidly admitted at the suppression hearing that there was no tangible evidence connecting defendant to the crime prior to his interrogation; it

is highly unlikely he would have attempted to effect an arrest in view of this fact.

Moreover, we note that although defendant finds it particularly telling with respect to the arrest issue that officer Lienard accompanied him when he returned to the corner to talk to his girlfriend, the fact that defendant was allowed to leave the station on foot is actually probative of a lack of restraint.

The defendant next raises the question whether he knowingly waived his rights against self-incrimination prior to confessing. While acknowledging that he was advised of his rights and that he signed a waiver with respect to them, defendant asserts that he was not possessed of sufficient intelligence to understand the admonitions and the significance of his signing the waiver. We disagree.

Our supreme court recognized in *People v. Turner*, 56 Ill. 2d 201, 205, 306 N.E.2d 27, 30, that:

> "The purpose of advising an accused of his rights is to enable him to make an intelligent decision, and to understand the consequences of that decision, and the fact that the advice was iterated and reiterated, and that he said he understood it, is of little consequence unless the defendant was possessed of the intelligence to understand the admonition."

However, the court also noted that a defendant's mental deficiency, of itself, does not render a confession involuntary but rather is merely a factor which must be considered in the totality of the circumstances under which one's constitutional rights were waived or a confession made. *Turner*, 56 Ill. 2d 201, 205, 306 N.E.2d 27, 30; *see also People v. Simmons*, 60 Ill. 2d 173, 326 N.E.2d 383; *People v. Hester*, 39 Ill. 2d 489, 237 N.E.2d 466, *cert. dismissed*, 397 U.S. 660, 90 S. Ct. 1408, 25 L. Ed. 2d 642.

The only evidence introduced at the suppression hearing concerning defendant's mental abilities was Mrs. Boerckel's testimony that defendant had limited reading skills and that he attended special education classes through tenth grade.

The trial court, giving this evidence due weight, was nevertheless justified in finding that defendant was possessed of sufficient intelligence to understand and knowingly waive his rights. This is true because of the other circumstances of record. Defendant's reading level was not as crucial here as it might have been under other circumstances since the *Miranda* rights were read to defendant rather than by him and were paraphrased into simpler language before defendant indicated he understood them. We also note that the trial judge was in an unexcelled position to assess defendant's abilities since he was able to view defendant on the stand and observe the demonstration of his reading skills first hand. Moreover, the trial testimony of neuro-psychriatrist John Goldsborough also supports the conclusion that defendant was capable of making an intelligent waiver of rights. Dr. Goldsborough confirmed that defendant was of borderline intelligence with an IQ of about 70, and that he had a long-standing reading defect; however, he was of the opinion that defendant was able to understand oral communications very well and that he could understand the *Miranda* warnings if given to him verbally.

Defendant's final argument with respect to his confession is that it was not voluntarily made, that it was a product of coercion.

The general rules with regard to voluntariness of confessions were succinctly set forth in *People v. Prim*, 53 Ill. 2d 62, 70, 289 N.E.2d 601, 606, *cert. denied*, 412 U.S. 918, 93 S. Ct. 2731, 37 L.Ed. 2d 144:

> "Whether a statement is voluntarily given depends upon the totality of the circumstances. The test is whether it has been made freely, voluntarily, and without compulsion or inducement of any sort or whether the defendant's will was overcome at the time he confessed. [Citation.] In making its decision the trial court need not be convinced beyond a reasonable doubt, and the finding of the trial court that the statement was voluntary will not be disturbed unless it is contrary to the manifest weight of the evidence."

The trial court found that defendant's confession was voluntary. We do not think that this finding was against the manifest weight of the evidence. The defendant asserts in support of his contention of coercion that he was illegally detained and that he was falsely confronted with incriminating evidence. We have already found that defendant was not under arrest or otherwise unlawfully restrained prior to the interrogation. Consequently, if defendant's confession was involuntarily made, defendant's will must have been overborne by the alleged misrepresentation made by detective Huggins.

The record reveals that detective Huggins never told defendant that his fingerprints were recovered from the victim's residence. He merely told defendant that some fingerprints had been found and that he believed they could be defendant's. In fact, none of the fingerprints discovered at the scene were identifiable, but this was not known at the time of the interrogation.

Although Huggins, by making this statement, may have misrepresented the evidence against defendant and led him to believe that his fingerprints had been recovered from the scene of the crime, we find that this deception was neither of a nature likely to produce an untrustworthy confession nor so reprehensible as to be offensive to basic notions of fairness. *People v. Pritchett*, 23 Ill. App. 3d 368, 319 N.E.2d 101 (abstract); *People v. Houston*, 36 Ill. App. 3d 695, 344 N.E.2d 641, *cert. denied*, 429 U.S. 1109; *People v. Griffith*, 40 Ill. App. 3d 690, 353 N.E.2d 53.

Defendant was thoroughly admonished as to his rights and was not subjected to physical abuse, threats or promises. In view of these circumstances we cannot say that the trial court erred in failing to suppress his confession. *People v. Houston, People v. Pritchett.*

In summary, we have concluded that defendant was not under arrest prior to questioning, that he knowingly and voluntarily waived his *Miranda* rights, and that the confession which followed was voluntarily made and properly admitted into evidence.

The defendant next contends that he was deprived of due process by the court's denial of his request for discovery of "any and all evidence developed on any other individuals that were possible subjects (sic) in the alleged crime in the Indictment." He asserts that this material was discoverable under Supreme Court Rule 412(c) (Ill. Rev. Stat. 1975, ch. 110A, par. 412(c)) which provides in part that "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged * * *."

The defendant has not directed our attention to any item that was not disclosed as a result of the trial court's ruling that would have tended to negate his guilt. The State indicated in its response to defendant's discovery motion that it was not in possession of any such material. We have no reason to doubt the veracity of that representation. Surely the fact that some other young men in the Litchfield area may have been considered suspects during the preliminary stages of investigation does not indicate that any material developed with respect to them would tend to negate defendant's guilt of these crimes. The trial court did not err in denying discovery as to these materials. "The State is not required to produce a defendant's witnesses or create his defenses." (*People v. Lighting*, 83 Ill. App. 2d 430, 435, 228 N.E.2d 104, 106.) Moreover, most,

if not all, of the information sought by defendant was supplied to him in the form of the investigation report of Litchfield police officer Richard Elledge.

This court declines to consider defendant's contentions that the trial court erred in admitting evidence of blood grouping tests and certain statements alleged to be spontaneous declarations and that he was denied a fair trial as a result of prosecutorial misconduct. We believe that these issues have been waived as a result of defendant's failure to adequately specify them in his written post-trial motion. *People v. Rogers*, 32 Ill. App. 3d 788, 336 N.E.2d 784; *People v. Marshall*, 50 Ill. App. 3d 615, 365 N.E.2d 1122; *People v. Witherspoon*, 33 Ill. App. 3d 12, 337 N.E.2d 454.

Defendant's post-trial motion attempted to incorporate by reference all motions and objections denied or overruled both before and at trial. We believe the following comment of the court in *People v. Rogers*, 32 Ill. App. 3d 788, 790, 336 N.E. 2d 784, 785 is equally appropriate here:

> "If such a request truly did preserve all errors, the rationale behind post-trial motions would be destroyed."

The defendant's next contention is that the evidence did not sufficiently corroborate his confession so as to support his conviction for rape. He argues that the only evidence apart from the confession to link him in any way to the crime is the equivocal evidence as to the blood grouping.

It is well settled that while a conviction cannot be based on a confession alone, the other evidence in the case need not be sufficient by itself to connect the defendant to the offense. (*People v. Norcott*, 44 Ill. 2d 256, 255 N.E.2d 442; *People v. Walden*, 43 Ill. App. 3d 744, 357 N.E.2d 232.) It is enough if the other evidence tends to show that a crime did in fact occur or to corroborate the confession. (*People v. Norcutt; Peo-*

ple v. Walden.) We have reviewed the record and conclude that the evidence is sufficient in this respect.

The medical evidence and spontaneous statements of the victim to the McCarts established the occurrence of both the rape and aggravated battery offenses. Defendant's confession was corroborated in all material respects by the spontaneous declarations of the victim, indicating that he was in fact the perpetrator of these crimes. In addition, defendant's identity as the offender was also bolstered by the fact that both the rapist and defendant had long hair, type O blood and were secretors. Defendant's confession was further corroborated by the fact that defendant knew the victim was wearing no undergarments at the time of the attack.

The defendant further contends that the sentences imposed in this case are excessive. It is apparently his position that the trial court overlooked his young age and did not give due consideration to his potential for rehabilitation.

Sentencing is a matter within the sound discretion of the trial court, and absent an abuse of discretion, a sentence imposed will not be disturbed by a court of review. (*People v. Perruquet*, 68 Ill. 2d 149, 368 N.E.2d 882.) Under the rationale of *Perruquet*, our function is not to serve as a sentencing court but only to determine whether the lower court abused its discretion when imposing the sentence.

The record reflects that in imposing these sentences, all of which are greater than the minimum term, the court confined itself to considering the nature and circumstances of the offense and the history and character of defendant as directed by statute. (Ill. Rev. Stat. 1977, ch. 38, par. 1005-8-1(c)(2), (3) and (4).) After considering the same criteria, we cannot find that there has been an abuse of discretion in imposing sentences.

First, we agree with the trial court that this is a serious offense. The defendant invaded the home of the 87-year-old victim and raped her in such a violent manner as to break her leg and a rib. Since this assault, the victim has been unable to care for herself. Second, defendant's past history of offenses does not reflect favorably on his potential or willingness to refrain from criminal activity. At the time he committed the instant offenses, he was on parole from a commitment to the juvenile division of the Department of Corrections stemming from two burglary charges. He had been at liberty for only a few months. Prior to these offenses, he had been convicted of illegal possession of alcohol by a minor and disorderly conduct (obscene phone calls). The instant sentences were proper.

Defendant's final contention is that the trial court erred in denying defendant's motion to determine the defendant's fitness for sentencing.

The statutory provision governing fitness to stand trial or to be sentenced provides that a hearing on the question need only be conducted when a *bona fide* doubt of the defendant's fitness is raised. (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-1(c). The question whether a *bona fide* doubt regarding a defendant's fitness exists lies within the sound discretion of the trial court, and an order of the trial court refusing a fitness hearing will be overturned only where the court has abused its discretion. *People v. Morthole*, 51 Ill. App. 3d 919, 366 N.E.2d 606; *People v. Carter*, 16 Ill. App. 3d 842, 306 N.E. 2d 894.

We find that the trial court did not abuse its discretion in refusing a pre-sentencing fitness hearing. Defense counsel did not present any evidence relevant to defendant's fitness in his motion or in argument that had not already been considered by the court. Although defendant is of low intelligence, there is nothing in the record to contradict Dr. Goldsborough's pre-trial finding that defendant was fit to stand trial.

For the foregoing reasons, we affirm the judgment of the circuit court of Montgomery County.

Affirmed.

KARNS, J., concurs.

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MR. PRESIDING JUSTICE GEORGE J. MORGAN dissenting:

Defendant, a 17 year old educable mentally handicapped young man, was standing on the corner of Main and Poplar Streets in Mount Olive, Illinois, waiting to meet a girl friend when he was picked up by Officer David Lienard of the Mount Olive Police Department and taken to the Mount Olive police station. This was done at the request of Larry Huggins, an Illinois State police officer who later took a statement from the defendant in which defendant admitted committing the crime in question.

Huggins testified that he told the defendant that he was conducting an investigation and asked defendant if he would care to talk to him about the investigation. He said that defendant replied that he would be "glad to talk with me." Immediately thereafter he advised defendant of his constitutional rights as guaranteed by *Miranda*. He admitted that at the time he questioned defendant he had no probable cause to arrest him. He also admitted that he untruthfully told the defendant that his fingerprints were found at the scene of the crime. After Huggins told him this defendant gave Huggins a statement confessing to the crime.

Officer David Lienard of the Mount Olive Police Department testified that he picked up the defendant at the corner of Main

and Poplar Streets at approximately 2:50 p.m. on August 31, 1976. This was done at the request of Huggins. After defendant got to the police station, defendant said he wanted to talk to his girl friend who was supposed to meet him at the place where he was picked up.

"Q: In fact, how far from where you first apprehended Mr. Boerckel had you walked with him so that he could converse with his girl friend?

A: I didn't walk with him where I first apprehended him. I took him from where I first apprehended him to the police station and then from the police station I walked approximately one block on the south side of the street to the intersection of Main and Poplar there and that's when he conversed with his girl friend.

Q: All right, in other words, how did you get from the point that you apprehended him to the police station?

A: I believe the squad car, sir.

Q: He was in the car?

A: Yes, sir.

Q: And you drove down to the police station?

A: Yes, sir.

Q: You went into the police station?

A: Yes, sir.

Q: And then he asked that he wanted to talk to his girl friend?

A: I contacted Detective Huggins—I believe I explained to him first of all.

Q: Okay, what did you do, what did you do once you got back to the police station?

A: Well, I explained to him that Detective Huggins wanted to talk to him.

The arrest report of this incident filed by Lienard reads in part as follows:

> "On 8-31-76 Ptm Lienard of the Mt Olive Police Dept talked to Detective Larry Huggins of the Illinois State Police at District 11-A at 1:30 P.M. Det. Huggins informed Ptm. Lienard that he was looking for a Darren Boerckel of Litchfield in Reference to the Rape of [M.D.]. Patrolman Lienard advised that if he located Boerckel he would hold him and Contact Det. Huggins.
>
> At 2:45 PM Ptm Lienard seen the Boerckel subject at the corner of Poplar and W Main and picked him up and returned to the Police Station. Ptm Lienard advised the Boerckel subject who identified himself as Darren E Boerckel of 345 S Grant, Litchfield, Ill, white, male, DOB 1/29/59. Ptm. Lienard informed him that Detective Huggins of the Illinois State Police wanted to talk to him in reference to an Investigation going on.
>
> Darren Boerckel requested that Ptm Lienard go with him to the corner of Poplar & Main so he could tell his girl friend not to wait for him. Ptm Lienard complied with this request. Ptm Lienard called District 11-A at 2:55 PM and requested Detective Huggins at which time 11-A contacted him and advised Ptm Lienard he was on his way to Mt. Olive PD."

Defendant testified that he did not go with Lienard willingly and that he was searched at the station prior to the time that Huggins arrived. His testimony that he was searched was not rebutted.

In spite of the foregoing evidence, the majority holds that the defendant was not under arrest until after he incriminated himself. How the majority can square this holding with their decision in the recent case of *People v. Foster,* (Docket No. 78-208, filed Nov. 28, 1978), Ill.App.3d —, N.E.2d —, is difficult to see. In that case this court said:

> "An arrest involves the authority to arrest, an assertion of that authority with *intention* to effect an arrest, and the restraint of the person to be arrested. [Citations.] All of these elements are present in the instant case notwithstanding the police officers' statements that respondent was not arrested and was free to leave. We first note that intent, being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. The officers' declarations of intent at the hearing are only one factor in considering whether respondent was under arrest. In recognition that such declarations are often self-serving and conclusory, we feel compelled to scrutinize the acts of all the participants as well. The evidence shows that Officer Lively instructed the officers of the DuQuoin Police Department to bring respondent to the police station. This directive was mandatory, not discretionary. When Officer Jackson confronted respondent on Division Street, it was apparent that respondent had no choice but to comply with the request to get in the squad car. The fact that respondent offered no resistance does not lend support to the State's argument that there was no arrest. Respondent simply recognized that if he failed to comply with Jackson's demand he still would be taken to the station. Likewise, at the interrogation, respondent had reason to believe that it would be futile to attempt to leave. Although Officer Lively testified that respondent could have left, in light of the intensive interrogation in the courtroom in the presence of two police officers, respondent had no reasonable opportunity to go home until after the termination of the questioning. The State cannot now assert that respondent was free to go when it was apparent that he was being restrained."

In its opinion in this case the majority says:

> "The medical evidence and spontaneous statements of the victim to the McCarts established the occurrence of

both the rape and aggravated battery offenses. Defendant's confession was corroborated in all material respects by the spontaneous declarations of the victim, indicating that he was in fact the perpetrator of these crimes. In addition, defendant's identity as the offender was also bolstered by the fact that both the rapist and defendant had long hair, type O blood and were secretors. Defendant's confession was further corroborated by the fact that defendant knew the victim was wearing no undergarments at the time of the attack."

Did the perpetrator of this crime have long hair? The State took an evidentiary deposition from the victim in this case, part of which was read into evidence by the defense:

"Q. Now you say that you can't recall the characteristics of the individual, is that correct?

A. Yes.

Q. The individual may have had short hair?

A. I don't know.

Q. You just don't recall if it was short hair or long hair?

A. Short hair.

Q. Pardon.

A. If it is the same one I tthink he had short hair."

Whether the defendant said he knew the victim was wearing no undergarments at the time of the attack is open to question, since it was not included in the statement taken from him by Huggins.

The result reached by the majority in this case is also in direct conflict with *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254, and *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S. Ct. 407.

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No. 79-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DARREN BOERCKEL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari To The Illinois Appellate Court Fifth District

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
JURISDICTION	1
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I.	
THE ILLINOIS APPELLATE COURT DECISION IS CONSISTENT WITH THE HOLDING OF *DUNAWAY V. NEW YORK*, ___ U.S. ___, 99 S. CT. 2248 (1979) BECAUSE THERE WAS NO FOURTH AMENDMENT VIOLATION SINCE THE PETITIONER VOLUNTARY ACCOMPANIED OFFICER LIENARD TO THE POLICE STATION	7
II.	
THE ILLINOIS APPELLATE COURT DECISION IS CONSISTENT WITH THE HOLDING OF *DUNAWAY V. NEW YORK*, ___ U.S. ___, 99 S. CT. 2248 (1979) BECAUSE IF THERE WAS AN ILLEGAL SEIZURE, THE SUBSEQUENT CONFESSION WAS SUFFICIENTLY ATTENUATED FROM IT SO AS TO DISSIPATE THE TAINT	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
Brown v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975)	10, 12, 13
Cuevas-Ortega v. *Immigration and Naturalization Service*, 588 F.2d 1274 (9th Cir. 1979)	8
Davis v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761 (1966)	11
Dunaway v. *New York*, ____ U.S. ____, 99 S. Ct. 2248 (1979)	7, 9, 10, 13
Oregon v. *Mathiason*, 429 U.S. 492, 97 S. Ct. 711 (1977)	11
Terry v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)	7, 9
United States v. *Bailey*, 447 F.2d 735 (5th Cir. 1971)	8
United States v. *Brunson*, 549 F.2d 348 (5th Cir. 1977)	7, 8
United States v. *O'Looney*, 544 F.2d 385 (9th Cir.) *cert. denied, 429 U.S. 1023, 97 S. Ct. 642 (1976)*	13
Wong Sun v. *United States*, 371 U.S. 471, 83 S. Ct. 407 (1963)	9, 10, 13
Other Authority	
13 Houston L. Rev. 753 (1976)	12

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, respondent submits that petitioner has failed to show reason for this Court to exercise its judicial discretion to grant this Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was a Fourth Amendment violation since the petitioner voluntarily accompanied the police officer to the police station.

2. Whether petitioner's confession was sufficiently attenuated from the alleged illegal seizure so as to dissipate the taint.

STATEMENT OF THE CASE

On March 22, 1977, a jury found the petitioner guilty of rape, burglary and aggravated battery.

Prior to trial petitioner filed a Motion to Suppress Confession and Statements. (Vol. I, 13)[1] On November 30, 1976, a hearing was held on that motion.

On direct examination at the Suppression Hearing, Officer Lienard testified that he came in contact with the petitioner at approximately 2:50 p.m. at the corner of Main and Poplar Street. This corner was one block away from the Mount Olive Police Station. (Vol. I, Supp. H. 52) Officer Lienard told the petitioner that he and Detective Huggins would like to talk to him. Once they were at the police station, Officer Lienard contacted the State Police Headquarters and asked them to notify Detective Huggins that the petitioner was at the station. (Vol. I, Supp. H. 39)

Officer Lienard had a conversation earlier that day with Detective Huggins and Officer Elledge concerning the petitioner. Officer Lienard testified that, "they told me they wanted to talk to Darrin Boerckel and had been unsuccessful locating him. And I told them I had seen him in Mount Olive before and if I located him I would notify him." (Vol. I, Supp. H. 42) Other names were also mentioned during a discussion that Detective Huggins had with Officer Elledge. At least one or two of those people were interviewed by the police. (Vol. II, Tr. 263) The name Gary Martin was mentioned. Gary Martin lived in the same neighborhood as the victim and he had a record for rape.

[1] References to the record are made to two volumes of Excerpts from the Record which were filed by the petitioner with the Appellate Court of Illinois, Fifth District. The volume number is shown as "Vol" with the page number following. "Supp. H." before the page number refers to a page in the transcript of the Suppression Hearing. "Tr." before the page number means that it is a page from the trial proceedings.

(Vol II, Tr. 264) Petitioner lived in Litchfield, Illinois, approximately half a block from the victim. (Vol. II, Tr. 24)

Officer Lienard understood that he was not to take the petitioner into custody if he saw him. He was "just [to] determine whether or not he [the petitioner] would talk to Detective Huggins & assist him in his investigation." (Vol I, Supp. H. 42)

On cross-examination Officer Lienard was asked if he made a telephone number of any police department available to petitioner so that he could contact the police for an interview. Officer Lienard responded that, "He wanted to stay and talk to Detective Huggins, so then I didn't think it was necessary to provide him with a telephone number." (Vol. I, Supp. H. 52) When questioned if he had asked the petitioner to go down to the police station, Officer Lienard answered that he had asked. (Vol. I, Supp. H. 52)

Officer Lienard further testified that when he and the petitioner arrived at the police station, the petitioner requested to see his girlfriend at an intersection to tell her to go on to work and he asked Officer Lienard to give him a ride to where his girlfriend worked. (Vol. I, Supp. H. 43)

The petitioner did contact his girlfriend on that day. Officer Lienard testified that both he and the petitioner walked down to a corner one block from the station where the petitioner talked with his girlfriend.[2] (Vol. I, Supp. H. 56)

At the Suppression Hearing Officer Huggins testified that he arrived at the Mount Olive Police Station at approximately 3:40-3:45 p.m. (Vol. I, Supp. H. 9) He further testified that:

[2] The two volumes of Excerpts from the Record contain no testimony showing why Officer Lienard accompanied the petitioner to the corner where petitioner spoke with his girlfriend. The arrest report prepared by Officer Lienard states that the petitioner "requested that Patrolman Lienard go with him to the corner of Poplar and Maine so he could tell his girlfriend not to wait for him." (Vol I, 36)

> When I first arrived there and I told him that I was conducting an investigation, I asked him if he would talk to me and he indicated he would. I told him that he was not under arrest, that he was not being held. That he was free to go at any time. But if he would talk, I would discuss it [the investigation] with him. (Vol. I, Supp. H. 16)

Detective Huggins also advised the petitioner of his *Miranda* rights in clear language, which he read from a card, prior to any discussion on the investigation. He added that the petitioner could stop talking to him at any time and that he could demand a lawyer at any time. (Vol. I, Supp. H. 11)

After each right was read to the petitioner, he was asked if he understood it before Detective Huggins read the next one. Petitioner indicated that he understood after each particular right was read to him. (Vol. I, Supp. H. 12) It also appears that a written copy of the rights that were read to the petitioner were placed in front of him so that he could read them himself while Detective Huggins read them out loud. (Vol. I, Supp. H. 29)

The petitioner agreed to talk with Detective Huggins after the Detective finished informing him of his rights. (Vol. I, Supp. H. 11)

During the conversation that followed, the petitioner told Detective Huggins that on the evening of the rape he had walked to a filling station to purchase a coke. At that time he saw two men sitting on the victim's porch. He said he thought one of the men had a stocking cap on. (Vol. I, Supp. H. 12) Later in the conversation, Detective Huggins advised the petitioner that at the scene of the crime "there had been fingerprints on a window fan which I felt could be his" (Vol. I, Supp. H. 13) After this statement by Detective Huggins, petitioner admitted to breaking into the house, but not to commiting the rape. After Detective Huggins told him that it was not logical, both of them sat for a few minutes with no conversation until the petitioner said "I did it". (Vol. I, Supp. H. 13, 14)

Detective Huggins again advised the petitioner of his *Miranda* rights prior to filling out the written statement. (Vol. I, Supp. H. 14) The Detective wrote the statement because the petitioner said he could not read or write well. The petitioner indicated to the Detective that he wanted him to write the statement. (Vol. I, Supp. H. 14)

After the statement was written, Detective Huggins read the first page of the statement to petitioner, and petitioner indicated that he understood it and signed the page to show that he understood it. The same procedure followed for the second page of the statement. (Vol. I, Supp. H. 14) Petitioner was also advised that if there was anything he wanted to add, delete, or change in the statement when it was read to him, he could do so at that time. (Vol. I, Supp. H. 15) Detective Huggins testified that "we read through it [the statement] slowly and there was no indication by him [the petitioner] to make any alterations." (Vol. I, Supp. H. 15)

Detective Huggins testified that he and the petitioner talked for approximately an hour. (Vol. I, Supp. H. 15) During this time petitioner did not request to leave, he did not request counsel, there were no threats made against him and there was no use of physical force. (Vol. I, Supp. H. 15) Petitioner was not offered anything in return for giving the statement. Neither was he promised anything in return for the statement. (Vol. I, Supp. H. 16)

Latent prints were found at the scene of the crime, but not identifiable latent prints. The prints were not of sufficient quality to make any identification. (Vol. I, Supp. H. 31)

On direct examination, the petitioner testified that he did not tell Detective Huggins that he had seen two people on the front steps of the victim's house. (Vol. I, Supp. H. 67) Petitioner testified that he didn't tell Detective Huggins anything about the rape. (Vol. I, Supp. H. 69) He felt he could not leave at any time during the interview with Detective Huggins. (Vol. I, Supp. H. 67) As to the statement he signed, the

petitioner testified that Detective Huggins read the whole statement to him (Vol. I, Supp. H. 68) but he didn't know what he was signing. (Vol. I, Supp. H. 67)

When asked on cross-examination if anyone made him go to the Mount Olive Police Station, petitioner answered, "No." (Vol. I, Supp. H. 70)

When asked if he understood, at the time he signed it, that the statement said that he had raped the victim, petitioner responded, "Yes" (Vol. I, Supp. H. 72) When asked if he understood, at the time he signed it, that the statement could be used in court against him, petitioner responded, "No". (Vol. I, Supp. H. 78)

Petitioner also testified that he signed the statement of his own free will. No one forced him to sign and there were no threats and no promises. (Vol. I, Supp. H. 72)

When asked why he signed the statement if he didn't do it [the crimes], the petitioner responded, "I was mad". He wasn't mad at the police or the victim or his family. (Vol. I, Supp. H. 74) He was mad about a "lot of things" (Vol. I, Supp. H. 67) and he was mad at "a girl". (Vol. I, Supp. H. 75)

The trial judge denied the Motion to Suppress Confession and Statements. (Vol. I, Supp. H. 84)

The Illinois Appellate Court held that the petitioner was not under arrest prior to questioning, that he knowingly and voluntarily waived his *Miranda* rights, and that the confession which followed was voluntarily made and properly admitted into evidence.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE ILLINOIS APPELLATE COURT DECISION IS CONSISTENT WITH THE HOLDING OF *DUNAWAY* V. *NEW YORK*, ___ U.S. ___, 99 S.CT. 2248 (1979) BECAUSE THERE WAS NO FOURTH AMENDMENT VIOLATION SINCE THE PETITIONER VOLUNTARILY ACCOMPANIED OFFICER LIENARD TO THE POLICE STATION.

A person is considered "seized" under the Fourth Amendment whenever a police officer accosts him and restrains his freedom to walk away. Not all personal intercourse between policemen and citizens involve "seizures" of persons. *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968) The petitioner herein was not seized by Officer Lienard because Officer Lienard did not restrain his freedom to walk away. Petitioner was standing on the sidewalk in the afternoon and Officer Lienard was driving by on patrol when Officer Lienard spotted the petitioner. The Officer told the petitioner that Detective Huggins of the State Police wanted to talk with him about an investigation and he asked him if he wanted to come to the police station, which was one block away, to talk with the Detective. Petitioner could have refused Officer Lienard's invitation. Officer Lienard made no show of force and he did not order the petitioner to accompany him. Neither did he tell the petitioner what the investigation was about.[3]

A person is not arrested or seized under the Fourth Amendment if he is free to choose whether to enter or continue an encounter with police and he elects to do so. *United States* v. *Brunson*, 549 F.2d 348 (5th Cir. 1977) In *United States* v.

[3] Officer Lienard was not specifically asked whether he told the petitioner what the investigation concerned, but in his testimony at the Suppression Hearing, he only mentioned reference to an investigation.

Brunson, id, the court held that Brunson was not seized when he accompanied police investigators to police headquarters so that they could talk to him about a murder investigation. Turning to the facts, the court observed that when the police accosted the defendant at his home at 9:30 p.m., they had not focused on him as a suspect, let alone obtained information sufficient to support probable cause. The investigators told Brunson that he was not under arrest, that they intended to drive him home after the interview, and they wanted his decision whether to talk to them to be voluntary. At the pre-trial Suppression Hearing, in which Brunson attempted to suppress his statement and fingerprints, Brunson contended that his initial encounter with police at his home and the journey to the police station constituted an illegal arrest under the Fourth Amendment because there was no probable cause. The appellate court concluded that Brunson had voluntarily accompanied the police to the station and that the Motion to Suppress was therefore properly denied.

Voluntary action was also found in *Cuevas-Ortega* v. *Immigration and Naturalization Service,* 558 F.2d 1274 (9th Cir. 1979) where an illegal alien willingly spoke with investigators in her home. The court noted that the illegal alien was free to close the door on the investigators. As long as she was willing to talk to them, there was no seizure of her person.

In *United States* v. *Bailey,* 447 F.2d 735 (5th Cir 1971) the police asked Bailey to accompany them to the police station. There was no physical contact and there was no conversation between Bailey and the police during the ride to the station. The court held that the police action did not constitute an arrest because Bailey had voluntarily accompanied the officers to the station.

Although the facts in the foregoing cases and the facts in the present case are not identical, a comparison does show that when the petitioner accepted Officer Lienard's invitation to

accompany him to the station, when refusal was an option available to him, petitioner's choice was voluntary and Officer Lienard's action did not constitute a Fourth Amendment seizure.

The import of other facts which occurred after the petitioner's initial voluntary action is not clear due to the sparsity of testimony in the Record Excerpts concerning them. Petitioner's testimony that he was searched at the station is not contradicted by either of the officers, yet neither were any questions pertaining to a search put to the officers. As to the fact that Officer Lienard walked with the petitioner to the corner to speak with the petitioner's girlfriend, there is no testimony in the Record Excerpts explaining why the officer did this. The Arrest Report that was prepared by Officer Lienard after the petitioner confessed and was arrested, states that the petitioner asked Officer Lienard to accompany him.

II.

THE ILLINOIS APPELLATE COURT DECISION IS CONSISTENT WITH THE HOLDING OF *DUNAWAY* V. *NEW YORK,* ___ U.S. ___, 99 S.CT. 2248 (1979) BECAUSE IF THERE WAS AN ILLEGAL SEIZURE, THE SUBSEQUENT CONFESSION WAS SUFFICIENTLY ATTENUATED FROM IT SO AS TO DISSIPATE THE TAINT.

The exclusionary rule has no application when the connection between the arrest[4] and the confession has become so attenuated as to dissipate the taint. *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407 (1963) In *Wong Sun,* the illegal custody of Wong Sun was terminated because Wong Sun had been released on his own recognizance after a lawful arraignment. He returned voluntarily several days later to make a

[4] Whether a detention is called a "seizure" or an "arrest" is not significant for Fourth Amendment scrutiny. See *Terry* v. *Ohio, supra.*

statement. Under those circumstances, the Court held that the connection between the arrest and the statement had become so attenuated as to dissipate the taint of the unlawful arrest.

The attenuation exception to the exclusionary rule that was applied in *Wong Sun, id* was clarified in *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254 (1975) In *Brown* this Court determined that:

> the question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and particularly, the purpose and flagrancy of the official misconduct are all relevant . . . the voluntariness of the statement is a threshold requirement.

422 U.S. at 603, 604, 95 S. Ct. 2261, 2262.

In light of the foregoing criteria, this Court found no attenuation in *Brown.* There was also no attenuation in *Dunaway* v. *New York,* ____ U.S. ____, 99 S.Ct. 2248 (1979) a case described by this Court as being "virtually a replica of the situation in *Brown*". 99 S.Ct. at 2259

This case is distinguishable from *Brown* and *Dunaway* because petitioner's confession was sufficiently attenuated from the alleged illegal seizure so that his confession was the product of his own free will.

Applying the *Brown* criteria to the facts of this case, the conclusion follows that the threshold question of voluntariness is easily satisfied. Petitioner was read his *Miranda* rights slowly and in simple terms prior to any discussion on the investigation and once again, prior to the preparation of the written statement. The fact that a person is advised of his *Miranda* rights is a significant factor in considering the voluntariness of statements later made. *Davis* v. *North Carolina,* 384 U.S. 737, 86 S.Ct. 1761 (1966)

The Record Excerpts also show that there were no coercive influences leading the petitioner to confess. He was not threatened or promised anything and he was not placed in an interrogation room. Petitioner sat in the main office area while waiting for Detective Huggins. He was not subjected to intense questioning, rather he discussed what he knew about the crime with Detective Huggins. The conversation with Detective Huggins, including the time that it took to write the confession, lasted for approximately one hour.

During the conversation the petitioner first told Detective Huggins that he had seen two men, one wearing a stocking cap, on the porch of the victim's home when he went out for a coke on the evening of the crime. The petitioner lived only one-half a block away from the victim. From this, it would be logical and reasonable for Detective Huggins to continue the conversation in the hope that the petitioner would recall more details of what he saw.

Officer Huggins recalled that "I advised Darrin that at the scene there had been entry gained and in doing so there had been fingerprints on a window which I felt could be his . . . Darrin admitted breaking into the house; but he did not admit to the rape . . . " (Vol I, Supp. H. 12)

Within the context of the conversation, this statement by Officer Huggins did not bend the free will of the petitioner. If the petitioner was innocent, even with relatively low intelligence, he would know that Officer Huggins was mistaken about the fingerprints.

An analogous Fifth Amendment situation was encountered in *Oregon* v. *Mathiason,* 429 U.S. 492, 97 S.Ct. 711 (1977). There, the defendant's parole officer falsely told the defendant that his fingerprints had been found at a burglary scene and

then the defendant confessed. This Court disregarded the probation officer's false statement in holding that the parolee had not been in custody or otherwise deprived of his freedom of action in any significant way so as to require the interrogating officer to give Miranda warnings. Since the petitioner was not subject to seizure at the time that officer Higgins made his fingerprint statement, even if the petitioner had been initially illegally seized, the same significance should be attached to the false information in this case.

Two of the other three factors in *Brown,* which can show alteration of taint, are also satisfied in this case. Although there were only approximately two hours between the time that the petitioner arrived at the station and the time the confession was completed, the temporal proximity of the arrest and the confession is the vaguest and least determinative factor involved. 13 Houston L. Rev. 753, 764 (1976).

The presence of intervening circumstances, on the other hand, is a factor that is found here. It is the respondent's position that Detective Huggins' clear and simple statement to the petitioner, which he made when he first arrived at the station and prior to any discussion, was a full clarification to the petitioner of his free status which should have been reasonably understood even by an individual who could not read or write well. Officer Huggins told the petitioner that:

> he was not under arrest, that he was not being held. That he was free to go at any time. But if he would talk, I would discuss it [the investigation] with him.

Vol. I, Supp. H. 16.

If the petitioner thought that he was under arrest or otherwise being detained against his will due to his perception of Officer Lienard's actions, Detective Huggins' statement left no room for interpretation. The petitioner was free to go. Instead, the petitioner elected to stay and talk with the Detective. This choice by the petitioner is similar to Wong Sun's

decision to return to the police station and confess in *Wong Sun* v. *United States, supra.* Both the petitioner herein and Wong Sun spoke with the police when they were under no obligation to do so.

The final and most significant factor outlined in *Brown,* which is to be considered in determining whether a confession is obtained by the exploitation of an illegal arrest, is the purpose and flagrancy of the official misconduct. In this case, the Record Excerpts reveal that the police only wanted to talk to the petitioner to see if he had any information about the crime. Since he lived only one-half block from the victim, he could have seen something to aid their investigation. One or two other people were also interviewed at different times with regard to the crime, including someone who lived in the victim's neighborhood and who had a rape record.

While on patrol, Officer Lienard happened to spot the petitioner on the street, and he took that opportunity to ask the petitioner if he wanted to accompany him to the police station, which was only one block away, so that Detective Huggins could speak with him. Officer Lienard was under the impression that the petitioner voluntarily accepted his invitation.

These facts do not show a flagrant violation of the Fourth Amendment. By contrast, in *Brown* the petitioner was arrested forcibly by surprise at his home. And in *Dunaway* the petitioner was picked up at a neighbor's house and although he was not told that he was under arrest, he would have been physically restrained if he attempted to leave. In comparison with *Brown* and *Dunaway,* the alleged detention of the petitioner herein was relatively nonintrusive on his personal privacy. Where a Fourth Amendment violation is less flagrant, a lesser showing is required to purge a statement of taint. *United States* v. *O'Looney,* 544 F.2d 385 (9th Cir. 1976) *cert den.* 429 U.S. 1023, 97 S. Ct. 642 (1976).

CONCLUSION

For the foregoing reasons, the Respondent prays that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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